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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. [redacted]4199

JAMES HARRIES DAVIS and H. M. RUST,
Petitioners,

vs.

ARTHUR W. NEGIN, Trustee,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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Respondent.

PETITION FOR WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Judges of the Supreme Court of the United States:

James Harries Davis and H. M. Rust, petitioners herein, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on March 14, 1966 affirming the judgment of the United States District Court for the Northern District of Ohio, and the Referee in Bankruptcy.

OPINION BELOW.

The opinion of the Circuit Court is printed in the Appendix, *infra*, page 11, and is unreported as of the present time, other opinions are contained in the record.

JURISDICTION.

The jurisdiction of this Court is invoked under the Bankruptcy Act, and under the Constitution and 28 U. S. C. A., Section 1254 and 11 U. S. C. 47C. The judgment in the appeals court was entered March 14, 1966.

QUESTIONS PRESENTED.

1. Can the Referee in Bankruptcy under the first paragraph of Section 60D of the Act as amended effective May 8, 1963 construe and enforce it, so as to exceed the jurisdiction of the Bankruptcy Court over the estate of the bankrupt, and to take and turn over to the trustee in bankruptcy the property and assets of counsel, solely because of the relationship of bankrupt and counsel, in violation of the Fifth and Tenth Amendments of the Constitution of the United States?

2. Can the second paragraph of Section 60D which became effective May 8, 1963 and which has no relation to the Bankrupt estate, and which the Referee has applied to control the business and professional relations of bankrupt and counsel, and which places in the Referee control of any professional or business transaction between bankrupt and any attorney at law, whether before or after filing, whereby bankrupt agrees to pay money or transfer property to an attorney at law, the Referee can cancel or annul the obligation in whole or in part and compel restoration; be sustained as a valid enactment under the "subject of bankruptcies," or is it a violation of the Fifth and Tenth Amendments of the Constitution of the United States?

STATUTES INVOLVED.

The provision of the Bankruptcy Act, 11 U. S. C. A. Section 96D also being Section 60D of the Bankruptcy Act is printed in Appendix, *infra*, at page 13.

AMENDMENTS INVOLVED.

The pertinent provisions of the Fifth and Tenth Amendments of the United States Constitution are printed in the Appendix, *infra*, at page 14.

CONSTITUTIONALITY OF AN ACT OF CONGRESS INVOLVED.

In the Courts below the Referee in Bankruptcy was a party, as an officer of the United States, and 28 U. S. C. Section 2403 may be applicable. In the Courts below no certification was made to the Attorney General of the fact that the constitutionality of 60D of the Bankruptcy Act being an Act of Congress was drawn in question.

STATEMENT OF THE CASE.

The bankrupt was adjudicated a voluntary bankrupt on May 8, 1964 and the matter referred. Prior to bankruptcy the bankrupt secured the cash value of his insurance policies with his children as beneficiaries and paid the same to his counsel for services. At the date of bankruptcy there was no cash surrender value. The bankrupt borrowed $400.00 from Walter Sandel to pay on his bankruptcy fee. The total of $683.52 was paid prior to the adjudication, $51.00 of which was paid to the Clerk.

The bankrupt also wanted an understanding and limitation as to the cost of counsel's services after bankruptcy to assist him in getting reestablished and the

amount of $650.00 was agreed upon and a note executed for this purpose.

The Court on its own motion, over the objections of appellants as to the jurisdiction of the Court proceeded to examine, consider, evaluate and determine the amount of fees paid and the additional amount of money agreed to be paid to counsel. The referee made no finding that any of the monies involved were assets of the bankruptcy estate or caused any depletion of the estate to the prejudice of creditors.

The referee found the fee to be excessive by $182.52 and ordered this amount paid to the trustee, Arthur W. Negin.

The note for future services connected with the bankruptcy was cancelled, and the Court will hear further evidence to establish the amount thereof, if bankrupt and counsel cannot agree.

The appellants moved to dismiss at the close of the evidence, as Section 60D of the Bankruptcy Act violated the Fifth and Tenth Amendments of the Constitution, which was overruled.

The order of the Referee was confirmed by the District Court and by the Court of Appeals Sixth Circuit.

REASONS FOR GRANTING THE WRIT.

This petition brings before this Court matters in which are found no prior decisions of this Court aiding the administration of the "Bankruptcy Act," that there must be some limitation upon Congress to enact laws on the "subject of bankruptcies" would seem evident by the use of the phrase in the grant of the power contained in the Constitution.

Section 60D of the Bankruptcy Act as amended by Congress effective May 8, 1963 has not been adjudicated by this Court, and the validity of the statute as amended has been an issue in the litigation as being in violation of the Fifth and Tenth Amendments of the Constitution, and this Court has not determined it or passed upon it. The Bankruptcy Act affects the lives and welfare of many of our people and their attorneys, and the matter of their relationship should be settled by this Court, as well as the power of Congress to legislate on matters which the Constitution has placed within the control of the states.

The relationship of the Federal and State governments has been a matter of concern to this Court, and if there has been an invasion of individual or states rights it should be corrected at the earliest time, and any development stopped; see the views expressed by Justice Bradley in the case of *Boyd vs. U. S.*, 116 U. S. 616.

The Court was lacking any jurisdiction over the person of appellant and the subject matter of the proceeding, unless such subject matter was assets of the estate capable of being distributed to creditors. We claim that under no condition could the Bankruptcy Court exercise any jurisdiction over them without violating the Fifth Amendment of the Constitution. Has Section 60D which is that part of the section of the Act dealing with preferences

which result in a depletion of the estate to the prejudice of creditors, been so amended that it results in the depriving of persons of their property without due process of law.

The proceeds of the life insurance policies were not assets of the estate, as they had no cash surrender value on the date of adjudication. Policies of life insurance on the life of the bankrupt which do not have a cash surrender value available to the bankrupt at the time of bankruptcy do not pass to the trustee. *Burlingham vs. Crouse,* 228 U. S. 459; 57 L. Ed. 920; *Everett vs. Judson,* 228 U. S. 474; 57 L. Ed. 927; *Union Guardian Trust Co. vs. Lohman* (6th), 68 Fed. 2nd 311; see also *Collier,* 2nd Ed., Sec. 70.15, pages 960-961.

The proceeds of the life insurance policies were exempt regardless of amount under the state law, the beneficiaries being bankrupt's children. In Ohio by statute R. C. 3911.10 (formerly G. C. 9394) the life insurance policies involved in this bankruptcy and the proceeds as avails of such contracts, are immune from all the claims of the creditors of such insured person.

> "All contracts of life or endowment insurance or annuities upon the life of any person, or any interest therein, which may hereafter mature and which have been taken out for the benefit of, or made payable by change of beneficiary, transfer, or assignment to, the wife or children, or any relative dependent upon such person, or any creditor, or to a trustee for the benefit of such wife, children, dependent relative, or creditor, shall be held, together with the proceeds of or avails of such contracts, subject to a change of beneficiary if desired, free from all claims of the creditors of such insured person or annuitant. * * *"
> *In Re Weick,* 2 F. 2nd 647; *Doethlaff vs. Ins. Co.,* 117 Fed. 2nd 582; *Myer vs. U. S.,* 11 L. Ed. 2nd 293.

A transfer of exempt property does not amount to a preference as property of the bankrupt which is exempt under state law will not in any event constitute a part of his estate in bankruptcy for the purpose of distribution among creditors.

The transfer of the proceeds of the policies was made before bankruptcy and was voluntary and without fraud and no exemption was claimed for it in the schedule of bankrupt. *Collier on Bankruptcy,* 14th Ed., Sec. 6:11, page 847; *Collier on Bankruptcy,* 14th Ed. Sec. 60:25, page 879; *Rutledge vs. Johansen et al.,* 270 Fed. 2nd 881.

The $400.00 was never part of the bankrupt estate, it was borrowed to pay the bankrupt's attorney from Walter Sandel:

> "A transfer of money or property by a third person to a creditor of a bankrupt, which transfer does not issue from the assets of the bankrupt, does not diminish the bankrupt's estate and is therefore not a preference." *Collier on Bankruptcy,* 14th Ed., Sec. 60:26, page 880 et seq.; *Interstate Nat'l Bank vs. Luther,* 221 Fed. 2nd 382.

In *National Bank of Newport vs. National Herkimer County Bank,* 225 U. S. 178, 56 L. Ed. 1042, we find the following pertinent matters at page 1046 (L. Ed.):

> "But unless the creditor takes by virtue of a disposition by the insolvent debtor of his property for the creditor's benefit, so that the estate of the debtor is thereby diminished, the creditor cannot be charged with receiving a preference by transfer. Western Tie and Timber Co. vs. Brown 196 U. S. 502, 509; 49 L. Ed. 571, 574, 25 Sup. Ct. Rep. 339; Rector vs. City Deposit Bank Co., 200 U. S. 405, 419; 50 L. Ed. 527, 532; 26 Sup. Ct. Rep. 289."
>
> "These transfers of property, amounting to preference, contemplate the parting with the bankrupt's

property for the benefit of the creditor, and the consequent diminution of the bankrupt's estate. New York County National Bank vs. Massy, 192 U. S. 138, 147, 48 L. Ed. 380, 385; 24 Sup. Ct. Rep. 199."

Has the amendment of May 8, 1963 of Sec. 60D so changed the law that has been well established prior to that time, that it now violates the 5th and 10th Amendments, and now has no relation to the bankrupt estate, but is an attempt to regulate the practice of law and the relations of bankrupt and his counsel, and that to the embellishment of creditors with funds unobtainable to them otherwise.

The second paragraph of the amendment of Sec. 60D of the Act is new, the findings and order of the Referee show that he has acted in excess of it (1) he has set the maximum amount of $450.00 for the services of counsel in the bankruptcy proceedings, (2) that counsel had received a note for services in connection with the bankruptcy in the future and cancelled the notes as to any excess, (3) if bankrupt and counsel cannot agree to the excess the referee will hear further evidence to establish the amount thereof.

While we consider the referee's orders to be in excess of this amendment, it also raises the issue as to the validity of this amendment as conflicting with the 5th and 10th Amendments.

When we consider that the authority of Congress under Art. I, Sec. 8, Clause 4, is to establish uniform laws on the subject of Bankruptcies throughout the United States, it must do so without destroying the other rights under the Constitution. *Louisville Joint Stock Land Bank vs. Radford,* 295 U. S. 572, 573; 79 L. Ed. 1593; *Ginsberg vs. Lindell,* 107 Fed. 2nd 721.

The referee has assumed control over the relationship

under this amendment of client and counsel, without any nexus with the bankrupt's estate, but for services in the state courts and office practice arising in connection with the bankruptcy due to the client's changed conditions, and to assist him in becoming reestablished in business.

The Constitution gives no power to Congress to legislate in the field of the Arts and professions. The right to practice law and the control of the practice is reserved to the states and/or to the people.

The 10th Amendment reads as follows:

> "The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people."

The admission to the practice of law and the control of the professional regulation of the practice is in the exclusive control of the states. *In re: Belva A. Lockwood,* 154 U. S. 116; 38 L. Ed. 929; *Bradwell vs. Illinois,* 83 U. S. 130; 21 L. Ed. 443. A lawyer is admitted to practice in federal court by way of the state court. *Theard vs. U. S.,* 354 U. S. 278; 1 L. Ed. 2nd 1342-1344.

The Bar of the state of Ohio not only has the power to control the relations of counsel with their clients, including their charges for services, and has established adequate machinery for this purpose, among other matters it passes upon is to establish minimum fees for services of counsel in bankruptcy matters, in Richland County (where this matter arose), the Bar has set the minimum fee to be $20.00 per hour, the order of the Referee would fix it at a maximum of $15.00 per hour.

Either the creditors or the bankrupt is thus unjustly enriched at the expense of the Bar, upon whom Congress has cast the aspersion that it is unfit to control these matters, or to determine the reasonable charges for their

services, and that the acts of the Bar are not valid until examined, adjusted and confirmed by the Referee.

The second paragraph of amended Sec. 60D contains no reference to assets of the bankrupt estate, or limitation to the bankruptcy proceedings, or the attorney at law in the proceedings, but covers all services of any attorney or any business transaction entered into between the bankrupt and any attorney.

This is a clear and certain violation of the 5th and 10th Amendments, and renders the statute void. These questions are not new and have been decided in the past upon other subject matters. *Linder vs. U. S.*, 268 U. S. 3-5; 69 L. Ed. 810:

> "1. Congress cannot, under the pretext of executing delegated powers, pass laws for the accomplishment of objects not intrusted to the Federal Government.
>
> 2. Any provision of an act of Congress ostensibly enacted under powers granted by the Constitution, not naturally or reasonably adapted to the effective exercise of such powers, but solely to the achievement of something plainly within the power reserved to the states, is invalid, and cannot be enforced." See also the opinion of Justice Roberts in *U. S. vs. Butler*, 297 U. S. 188; 80 L. Ed. 477.

CONCLUSION.

It is respectfully requested that this Court issue its writ of certiorari to review the decision of the Court below.

Respectfully submitted,

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Attorney for Petitioners.

APPENDIX.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided March 14, 1966.)

Before: WEICK, Chief Judge, O'SULLIVAN, Circuit Judge and CECIL, Senior Circuit Judge.

PER CURIAM. In this case the appellant, James Harries Davis, employed appellant H. M. Rust, as an attorney, to file for him a petition in bankruptcy in the United States District Court for the Northern District of Ohio, Eastern Division. Prior to bankruptcy, the appellant Davis secured the cash value of insurance policies amounting to the sum of $283.52, which he paid over to appellant Rust, together with $400. of borrowed money, as attorney fees for legal services in the bankruptcy action. Fifty-one dollars of this amount was paid to the Clerk of Court as a filing fee. In addition to these sums, the appellant gave a note for $650. to the appellant Rust for legal services, to be rendered following the bankruptcy, in enabling the appellant Davis to be re-established in business.

The Referee in Bankruptcy, on his own motion, examined into the reasonableness of the fee paid by appellant Davis to appellant Rust and determined that $450. was a reasonable fee. He thereupon ordered the appellant Rust to pay $182.52, the amount in excess of a reasonable fee, to the trustee, Arthur W. Negin. He further ordered the appellant Rust to cancel a portion of the note for $650.

The District Court affirmed the order of the Referee and the appellants appealed to this Court. The Referee acted under Section 60(d) (Section 96, Title 11, U. S. C.) of the Bankruptcy Act, as amended effective May 8, 1963, which reads as follows:

"If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

"If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment or transfer has been made, returned to the bankrupt."

We hold that this statute is constitutional and valid. There was no abuse of discretion on the part of the Referee in fixing a reasonable fee and in cancelling a portion of the note given by appellant Davis to appellant Rust for future services.

The judgment of the District Court is affirmed.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREFORE, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that Appellee recover from Appellant the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.

Entered by order of the Court.
CARL W. REUSS,
Clerk.

STATUTE AND CONSTITUTIONAL PROVISIONS.

Section 60-d of the Bankruptcy Act.

d. If a debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney at law, for services rendered or to be rendered, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the trustee or any creditor and shall be held valid only to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

If, whether before or after filing, a debtor shall agree orally or in writing to pay money or transfer property to

an attorney at law after the filing, the transaction may be examined by the court on its own motion or shall be examined by the court on petition of the bankrupt made prior to discharge and shall be held valid only to the extent of a reasonable amount to be determined by the court, and any excess obligation shall be canceled, or if excess payment or transfer has been made, return to the bankrupt.

Fifth Amendment.

No person shall * * * be deprived of life, liberty, or property, without due process of law, * * *.

Tenth Amendment.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.